STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 26, 2011
v	No. 296080 Wayne Circuit Court
MARK DEANDRE ALLEN, Defendant-Appellant.	LC No. 09-016185-FC

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction and sentence, following a jury trial, for first-degree home invasion, MCL 750.110a(2), unlawful imprisonment, MCL 750.349(b), and unarmed robbery, MCL 750.530.[1] Defendant was sentenced to serve 10 to 20 years' imprisonment for the home invasion conviction and 7 to 14 years' imprisonment for the unlawful imprisonment and unarmed robbery convictions, to run concurrently. We affirm defendant's convictions, but vacate his sentences and remand for resentencing.

I. FACTUAL BACKGROUND

On June 2, 2009, at approximately 2:30 a.m., at least three men broke into the residence where Vanessa Bulley, her children Marlow, Dynada and Dynana, Dynada's boyfriend, Guylan Crawford, and Vanessa's four grandchildren were sleeping. At trial, Vanessa testified that she was awakened by a man in her bedroom, who was wearing a mask and a baseball cap. Vanessa heard other men ransacking the house and she heard someone being assaulted in another room. One of the men took the computers from her bedroom. The men also took her television set and her money. The men ordered the victims into the hallway. Vanessa heard noise coming from the basement where Marlow's bedroom was located. She then heard one of the men say "Mark, I need some help," and the man who was in the hallway responded by running downstairs. Dynada found her cell phone and called 911. Vanessa heard the men yell "5-0, 5-0" and then they all ran out the back door. After the men left, Vanessa took Marlow and Guylan to the

[1] Defendant was acquitted of two counts of assault with a dangerous weapon.

hospital, and then dropped her daughter and grandchildren off at another daughter's home before returning to her own home, where police were waiting.

Marlow testified that at about 2:30 a.m. on the morning in question, he was awakened when someone struck him in the head with an iron; he was also hit with a fan and a vacuum cleaner. Marlow saw a man wearing a hood and a nylon "du-rag" over his face. Marlow could not see any part of the man's face. Marlow struggled with the man, who called to another man using the name Mark. Two more men came downstairs; they, too were wearing "du-rags" over their faces. Marlow testified that while he was fighting with the men, one man's hat fell off and his "du-rag" came off of his face. Marlow recognized the man as defendant. Marlow had seen defendant around the neighborhood before, and both of Marlow's sisters knew him.

Marlow testified that he continued to fight with the men until they got him to the floor. They then asked him for money, guns and jewelry. Marlow indicated that his pants were "over there," and the men took his wallet and money. Then, two of the men went back upstairs. Marlow was able to get into the laundry room and he acted as though he was calling the police, yelling out his address and saying "we have some guys in the house." Two men returned to the basement. After an additional skirmish with Marlow, the men left the house.

Marlow went to the hospital where he was treated for his injuries, receiving 24 stitches in his right arm and eight staples in his head. After he was released, he provided police with a statement, telling them he thought he could identify one of the perpetrators. Police asked Marlow to participate in a photo line-up the next day, but he was unable to identify anyone in the array, including defendant. Marlow told police he needed to see more than the face; he needed to see the "whole body structure" because he had been standing face to face with the men during the altercation. At trial, Marlow testified that he "had no doubt" that defendant was one of the perpetrators.

Dynana Bulley testified that, on the morning in question, she was sleeping on the couch in the living room with her son when a man put his hand over her mouth and nose. The man told her to move her son aside and not to scream or yell. Then, he walked her to the back door where she saw someone else carrying out the televisions. It was dark in the living room and Dynana could not see the men's faces. One of the men asked Dynana who was else was in the house; she told him she did not know. Two of the men then took Dynana back to the living room and laid her on the floor. They told her to take off her clothes; one took her bra and the other one pulled down her pants. Then another man came down from upstairs and said "don't do that, that's some B.S.; that's not what we came here for," and the men stopped. Dynana heard her mother, sister and Guylan upstairs yelling; the baby was crying. One of the men went through Dynana's clothes, looking for money and the keys to a car. Then Dynana heard the man who was in the basement yell to the others to help him with Marlow. She heard them break down the door to the laundry room. Dynana heard Guylan yell again. After that, the men talked to each other and "then they just all ran out the back door." Dynana testified that she heard the men use "some little nickname" and heard them say "E" and "Mark." She recognized one man's coat; it was the

coat that Erick Rex[2] wore every day. He had worn the coat when he was at her house a couple of weeks earlier. Dynana was asked to view a line-up, but she was unable to identify anyone.

Dynada Bulley testified that, at about 2:30 a.m. on June 2, 2009, she was in her bedroom "half asleep"; Guylan and their son were also in the room. The door to the room "opened real fast" and two men came into the room. One of the men pulled Guylan by the back of his legs and told him to go lay down in the hallway. The other man, who Dynada identified as defendant, grabbed her ponytail and told her to "shut up," to not to say anything and to go lay in the hallway. She could not lie down because there was not enough room, so she sat in the hallway, holding her son. Dynada saw three men, all of whom were wearing dark clothing and had something covering their faces. Defendant had a "black silk mask thing and he had on a du-rag that was halfway off." When Dynada saw defendant's face, she immediately recognized him; she also recognized his voice. She recognized Erick, too; she knew Erick and defendant from the neighborhood.

One of the men asked Dynada for her cell phone and jewelry, and they asked Guylan for money. Guylan said he did not have any money, but then told Dynada to get money from a drawer. Dynada went to get the money and the men hit Guylan in the head. She heard "a lot of bumping" and then Erick told defendant that they needed him to come downstairs. When defendant went downstairs, Dynada went and got her cell phone. She started to call 911, but as the operator answered the call defendant returned upstairs, so she closed the phone.

Dynada was able to see defendant's face, and she heard the men say each other's names. Erick was wearing the same coat and hoody that she had seen him in recently. Later that morning, Dynada told police she believed that two of the perpetrators were defendant and Erick, and she showed them where Erick lived. A day or two later, she picked defendant out of a photo line-up.

Detroit Police Investigator Lee Dyer was the officer in charge of the investigation. He testified that he and another officer conducted the photo line-up during which Dynada identified defendant. Dyer acknowledged that in Dynada's written statement of June 2, 2009, the name "Mario" was written in three places; one was crossed out with "Mark" written above it. Dyer did not know whether Dynada wrote the statement, or whether the officer to whom she was speaking did so. Dyer indicated that, in a second statement provided on June 3, 2009, Dynada referred to "Mark", and that Dynada always referred to "Mark" when speaking to Dyer. When Dynada identified defendant at the line-up, she said "that's Erick's brother; he's the one whose mask fell during a struggle and I saw his face." Dyer testified that the witnesses never faltered in their belief that Erick Rex and defendant were two of the perpetrators.

To Dyer's knowledge, no evidence was collected from the scene or from defendant, and neither defendant's nor Erick's residence was searched. Further, nothing taken from the house during the home invasion, or any of the clothing the perpetrators were wearing, was recovered.

---

[2] Erick Rex is defendant's brother, and was his codefendant below.

After a short period of deliberation, the jury found defendant guilty of first-degree home invasion, unlawful imprisonment and unarmed robbery; they acquitted defendant of two counts of assault with a dangerous weapon. The trial court sentenced defendant to serve concurrent sentences of 10 to 20 years for the home invasion conviction, and 7 to 14 years for the unlawful imprisonment and unarmed robbery convictions. This appeal followed.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel provided him with ineffective assistance by failing to request an adjournment to obtain the testimony of an alibi witness, after the witness failed to appear at trial to testify on defendant's behalf. We disagree.

Defendant preserved his ineffective assistance of counsel claim for review when he moved this Court to remand this case for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). However, this Court denied that motion and no *Ginther* hearing was held. In the absence of a *Ginther* hearing, this Court's review is limited to mistakes apparent on the record. *Id*.; *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

To establish his claim of ineffective assistance of counsel, defendant must show that his trial counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Defendant must also show that, but for counsel's error, it is likely that the outcome of his trial would have been different. *Id*. at 146. Effective assistance of counsel is presumed and defendant must overcome the presumption that counsel's performance constituted sound trial strategy. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Seal*, 285 Mich App 1, 17; 776 NW2d 314 (2009); *Henry*, 239 Mich App at 146. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Decisions such as what evidence to present, or whether to call or question witnesses, are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008); *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

A defendant is entitled to have trial counsel investigate, prepare, and present all substantial defenses. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Payne*, 285 Mich App at 190. "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 536; 465 NW2d 569 (1990). Further, "a substantial alibi defense would be one in which defendant's proposed alibi witness verifies his version." *Id*. at 527.

Before trial, defense counsel filed a notice of alibi, indicating that defendant would be relying on an alibi defense and would be calling Nicole Harris,[3] who would testify that "defendant was away from the scene during the time of the alleged offenses, at a residential house, located at 11819 Grayton, in Detroit, Michigan." However, Harris failed to appear to testify at trial and the alibi defense was abandoned. Defendant advised the trial court that Harris was not present to testify because "she just went into labor with my fourth child and she can't really, you know, leave the baby with anyone [be]cause the baby ain't no older than a week old now." The trial court clarified that Harris had actually given birth previously, and she was not currently hospitalized.[4] The trial court then noted that Harris had neither appeared to testify nor contacted the court. When the court inquired of counsel whether defendant still intended to present an alibi defense in Harris's absence, counsel indicated that he did not. Defendant elected not to testify on his own behalf, and the defense rested without calling any witnesses. At sentencing, defendant again noted Harris's absence at trial, explaining that she was his witness, "but she was in the hospital having labor when [his] trial was going on."

On appeal, defendant now argues that his trial counsel's failure to request an adjournment to obtain Harris's testimony deprived him of a substantial alibi defense and that there was no strategic reason for this decision. However, defendant has not provided this Court with anything to substantiate that Harris would have testified in support of his alibi defense. Defendant "has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). To establish that he had a substantial alibi defense, defendant is required to show that Harris would have "verifie[d] his version." *Kelly*, 186 Mich App at 527. Other than the notice of alibi defense filed in the trial court, and defendant's statements to the trial court that Harris was not present because she was in labor and had just given birth to a baby, there is nothing in the record to indicate that Harris was willing to testify on defendant's behalf.[5] Defendant has not offered any affidavit or other document setting forth the substance of Harris's expected testimony, or made any offer of proof to support his assertion that his trial counsel opted not to call Harris for other than strategic reasons.[6]

---

[3] Harris is, or was, defendant's significant other and the mother of his four children.

[4] Defendant indicated that Harris went into labor on October 16, and had already had the baby; defendant's exchange with the court took place on November 2.

[5] Certainly, Harris's presence at sentencing could be viewed as supporting defendant, and perhaps it could be inferred from her presence at sentencing that she may have been willing to testify in his defense. However, there is nothing in the record, from Harris or otherwise, constituting an affirmative indication that such was the case.

[6] Indeed, it is possible that Harris was not willing to testify on defendant's behalf, or that she could not do so truthfully. To the extent that this may be the case, we note that a claim of ineffective assistance of counsel cannot be premised upon a failure to present perjurious testimony. *LaVearn*, 448 Mich at 217-218.

Therefore, defendant has failed to meet his burden of establishing the factual predicate for his claim. Consequently, there is no basis to conclude that defense counsel's performance fell below an objective standard of reasonableness in this case. *Hoag*, 460 Mich at 6; *Henry*, 239 Mich App at 145-146

Further, even were defendant to have established that his counsel's failure to request an adjournment fell below an objective standard of reasonableness, defendant has not established that counsel's purported error affected the outcome of the proceedings. First, the decision whether to grant an adjournment was discretionary with the trial court. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). Thus, the trial court could have elected to deny any such request. Additionally, as noted above, defendant has not established the substance of Harris's expected testimony. Finally, there was substantial eyewitness testimony presented at trial to establish that defendant was among the perpetrators. Therefore, defendant has not afforded this Court with any basis to conclude it is likely that the proceeding's outcome would have been different had his counsel requested an adjournment of the trial to obtain Harris's testimony. *Id*. at 146. Reversal of defendant's conviction is not warranted.

III. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor committed misconduct depriving him of a fair trial by improperly vouching for the credibility of the prosecution witnesses and putting forth her personal belief that defendant was guilty of the charges against him. Defendant further asserts that his trial counsel's failure to object to the prosecutor's statements in this regard constitutes ineffective assistance of counsel. We disagree.

During her closing and rebuttal arguments, the prosecutor made the following comments, to which defendant now takes exception:

> You hear[d] testimony of both the girls and Marlo[w] saying, Mark[,] having one of the other people call for Mark to come here who's not getting – you need help or, Erick, don't do that you're doing this wrong, all working together on the different spots that they were around that house and dealing with the different people around that house to get as much as they could[,] to keep those people together as much as they can or to assault them so bad that they can't do anything to go back to them and *the People believe that we have shown beyond a reasonable doubt that [defendant] is guilty of all the charges in this case and we ask that you find him guilty.*
>
> * * *
>
> . . . When you've got two witnesses actually who were adamant that [defendant] is the person that was in their house, you've got Dynana who recognized his voice immediately and then saw his face and Marlo[w] who saw his face and if they wanted to just pick randomly anybody to be in their house, why wouldn't the other sister and the mother say they saw them, too, if this was not the person of the other two.

> All of them, if they want to be wrong, they want to lie, they wanted to just try to get [defendant] they would all say that they saw his face, *not simply tell the truth like they did* and say that they did not see anyone.
>
> Any inconsistencies in this case were strictly on clothing and you know when you get a group of people together and you can look at what someone has on and they walk out most of the people will come up with what they had on differently, but [as to] what actually happened in this case, there are no inconsistencies.
>
> Everyone is consistent on what happened throughout the whole thing. . . .
>
> * * *
>
> Very adamant, that is the person I saw. That is the person's voice I recognized and I recognized his brother as well. *I believe we have shown beyond a reasonable doubt that he is guilty of all of the charges and that the witnesses have shown their credibility and their consistency with the facts that matter to show that [defendant] is guilty of all the charges*. [Emphasis supplied by defendant.]

Defendant did not object to these comments at trial. Therefore, his assertion that the prosecutor committed misconduct depriving him of a fair trial is unpreserved. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144; 618 NW2d 590 (2000). This Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Reversal is warranted only when plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of the proceedings. *Id*. at 448-449.

Issues of prosecutorial misconduct are decided on a case by case basis by reviewing the pertinent portion of the record in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test is whether the defendant was denied a fair trial. *Id*. The propriety of a prosecutor's remarks depends on all of the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The remarks must be read as a whole and evaluated in light of defense arguments and the relationship to the evidence admitted at trial. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995); *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). A prosecutor may not vouch for the credibility of a witness to the effect that he or she has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). However, a prosecutor may argue from the facts in evidence that a witness is worthy of belief. *Id*. at 22; *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007); *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

Contrary to defendant's assertions, the prosecutor did not vouch for the credibility of the witnesses, nor indicate that she had some special knowledge that the witnesses testified truthfully. Rather, read in context, the prosecutor merely argued from the evidence presented that the witnesses were worthy of belief. Thus, there was nothing improper in the prosecutor's

remarks.[7] *Bahoda*, 448 Mich at 276; *Seals*, 285 Mich App at 22; *Dobek*, 274 Mich App at 67; *Thomas*, 260 Mich App at 455. Further, because there was no misconduct, trial counsel was not ineffective for failing to object; counsel need not make futile and meritless objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

IV. CUMULATIVE ERROR

Defendant argues that cumulative error requires reversal. This Court has recognized that, while the effect of individual errors occurring during the course of a proceeding may not provide a basis for reversal of a conviction, "it is possible that the cumulative effect of a number of minor errors may add up to reversible error." *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984). However, because defendant has not established the occurrence of any errors, which could have combined to deprive him of a fair trial, the cumulative error doctrine is inapplicable to this case. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999); *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

V. THE SCORING OF OV 8

Defendant argues that the trial court erred by scoring offense variable (OV) 8 at 15 points. We agree.

Defendant did not object to the scoring of offense variable (OV) 8 at his sentencing. However, he raised the issue in a timely motion to remand. Therefore, this issue is considered preserved. MCL 769.34(1); *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). This Court reviews preserved scoring issues to determine if the sentencing court "properly exercised its discretion and whether the evidence adequately supports a particular score." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

MCL 777.38(1)(a) provides for a score of 15 points where "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense"; otherwise, OV 8 is to be scored at zero points, MCL 777.38(1)(b). The trial court did not indicate the basis for its scoring of OV 8. However, as there was neither evidence nor argument that the victims were held captive beyond the time necessary to complete the crime, the scoring of OV 8 could only have been premised upon a

---

[7] Even were we to conclude that the statements by the prosecutor were impermissible, the trial court instructed the jurors that "[t]he opening statements, the closing statements given to you by the attorneys are not evidence," and, as this Court explained in *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008), "[c]urative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements and jurors are presumed to follow their instructions." Therefore, defendant's assertion of prosecutorial misconduct does not warrant reversal of his convictions.

finding that one or more victims were asported to a place or situation of greater danger within the meaning of MCL 777.38(1)(a).

"Asportation" is not defined in the statute. But, this Court has determined that "[a]sportation, involves movement in furtherance of the crime that is not incidental." *People v Spanke*, 254 Mich App 642, 647-648; 658 NW2d 504 (2003). "Asportation" can be accomplished with or without the use of force. *Id*. This Court has held that a victim is asported to a place or situation involving greater danger when moved away from the presence or observation of others. *People v Steele*, 283 Mich App 472, 491; 769 NW2d 256 (2009); *People v Hack*, 219 Mich App 299, 313; 556 NW2d 187 (1996); *People v Piotrowski*, 211 Mich App 527, 529; 536 NW2d 293 (1995).

There are only two possible bases for the scoring of OV 8 in this case. First, the victims who were sleeping upstairs at the time of the home invasion were moved from their various bedrooms into the hallway. To permit a scoring of OV 8 at 15 points based on this movement, the hallway must have constituted a place or situation "of greater danger" than the individual rooms in which the victims were located when the offense began. In this case, and under the circumstances presented here, we do not find that to be the case. Moving the victims into the hallway did not move them away from the presence of others, to a place where it was less likely that they would be observed. Nor did it place them in any greater danger. And, while congregating the victims in the hallway may have permitted them to be watched by a single perpetrator, it also allowed them to observe the manner in which the other victims were being treated and it permitted them to better protect and defend each other. Indeed, testimony established that the perpetrators permitted Vanessa Bulley to sit in a chair in the hallway, rather than to sit or lie on the floor, after Dynada told them that her mother was "too old to sit on the floor." Thus, we find no basis, on this record, to conclude that the hallway constituted a place or situation of "greater danger" so as to support a score of 15 points on OV 8.[8]

The only additional movement of any victim that occurred during the commission of the home invasion, on which the scoring of OV 8 could be premised, was the movement of Dynana from the living room to the area of the back door and then back to the living room. However, we conclude that this movement was merely "incidental to committing an underlying offense," and thus, cannot support the scoring of OV 8 at 15 points in this case. *Spanke*, 254 Mich at 647.

As noted previously, Dynana testified that she was sleeping on the couch in the living room with her son when one of the men put his hand over her mouth and nose. After telling her to move her son aside, and not to scream or yell, the man walked Dynana to the back door, where she was asked who else was in the house. After she indicated that she did not know, two of the men took Dynana back to the living room. Under these circumstances, the moving of Dynana to the back door and then back to the living room was merely incidental to the commission of the

---

[8] We note that there was no testimony that any of the intruders were armed with weapons, and thus, nothing to indicate that it would have been easier for the victims to be assaulted or otherwise held captive once they were congregated in the hallway.

home invasion; it did not place her in greater danger than had she not been moved at all. See, e.g. *People v Thompson*, 488 Mich 888; 788 NW2d 677 (2010) (vacating the sentence of the defendant for a first-degree sexual conduct, based on a finding that the scoring of 15 points for OV 8 was not warranted by the defendant's movement of the victim from a living room to a bedroom because, "[a]ny movement of the complainant by the defendant was incidental to the commission of the crime and did not amount to asportation."). Accordingly, we conclude that the perpetrators' conduct in briefly moving Dynana to the back door and then back to the living room does not support a score of 15 points for OV 8.[9]

Defendant's OV score, including 15 points for OV 8, was 61, placing him at Level V. His Prior Record Variable score was 57, placing him at Level E. The sentencing guidelines range at the time of sentencing for an offender with PRV Level E and OV Level V was 87 to 145 months.[10] MCL 777.63. Properly scored, with OV 8 scored at zero points, defendant's OV score is reduced to 46 and his OV Level is IV. Based on those levels, defendant's sentencing guidelines range would be 84 to 140 months. An error in scoring that results in a different guidelines range requires resentencing.[11] *People v Jackson*, 487 Mich 783, 793-794; 790 NW2d 340 (2010); *People v McGraw*, 484 Mich 120, 131; 771 NW2d 655 (2009); *People v Fancisco*, 474 Mich 82, 89, 91-92; 711 NW2d 44 (2006). Consequently, defendant is entitled to resentencing.

We affirm defendant's convictions, but vacate his sentences and remand for resentencing. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly

---

[9] The fact that Dynana was subjected to preparation for a sexual assault once she was returned to the living room does not impact this analysis. The living room was where Dynana was located when the offense began and, as evidenced by the fact that the conduct of the perpetrators preparing to assault Dynana was both observed and halted by their confederate, it was not a location where the commission of an additional offense was less likely to be observed by others.

[10] Defendant notes, in his brief on appeal, that when his habitual third offender status is factored in, the sentencing guidelines range for defendant, as previously scored, was 87 to 217 months. However, there is no indication in the record that defendant was sentenced as a third habitual offender.

[11] Only if the trial court clearly indicated that it would have imposed the same sentence regardless of the error and the sentence falls within the appropriate range is resentencing unnecessary. *Francisco*, 474 Mich at 89 n 8; *People v Mutchie*, 468 Mich 50, 52; 658 NW2d 154 (2003).